



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 232, and 252

[Docket DARS-2023-0004]

RIN 0750-AL27

**Defense Federal Acquisition Regulation Supplement: Prompt
Payment of Contractors (DFARS Case 2021-D008)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove a clause and the associated prescription that are no longer necessary.

DATES: Effective March 16, 2023.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

This rule implements section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283), which strengthened the requirement that DoD establish a goal to pay small business contractors within 15 days of receipt of an invoice. In particular, section 815(1) of the NDAA for FY 2021 amended 10 U.S.C. 2307(a)(2)(A) (now located in 10 U.S.C.

3801) by striking the language "if a specific payment date is not established by contract." Section 815(2) of the NDAA for FY 2021 amended 10 U.S.C. 2307(a)(2)(B) by striking the language "if the prime contractor agrees" and replacing it with the language "if the prime contractor agrees or proposes." Section 814 of the NDAA for FY 2022 (Pub. L. 117-81) rescinded section 815(2) of the NDAA for FY 2021.

In related Federal Acquisition Regulation (FAR) Case 2020-007, DoD, GSA, and NASA published a proposed rule at 86 FR 53923 on September 29, 2021, to implement a policy that provides for accelerated payments to contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. This change to the FAR implements section 873 of the NDAA for FY 2020 (Pub. L. 116-92). Section 873 requires agencies to establish an accelerated payment date for small business prime contractors, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. Section 873 also requires that, to the fullest extent permitted by law, the head of an agency establish an accelerated payment date for prime contractors that subcontract with small businesses, with a goal of 15 days after receipt of a proper invoice, if—

(1) A specific payment date is not established by contract;
and

(2) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

FAR Case 2020-007 implements portions of 10 U.S.C. 2307 (now located in 10 U.S.C. 3801-3808) stating requirements regarding accelerated payments applicable only to DoD. The FAR case implements section 815(1) of the NDAA for FY 2021 by excluding from DoD contracts the condition reflected in the language "a specific payment date is not established by contract."

Therefore, separate implementation of section 815(1) in the DFARS is not required.

DFARS Case 2021-D008 now rescinds portions of the DFARS that FAR Case 2020-007 renders moot. In particular, DFARS clause 252.232-7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, prohibits the contractor requiring any further consideration from or charging fees to the small business subcontractor in exchange for making accelerated payments. DFARS 232.009-2 prescribes inclusion of the clause at DFARS 252.232-7017 in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, that include the clause at FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors. FAR Case 2020-007 amends FAR clause 52.232-40 to include the same information as DFARS clause 252.232-7017, so the DFARS clause is duplicative

and no longer necessary. Therefore, it can be removed from the DFARS along with the prescription at 232.009-2.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is 41 U.S.C. 1707, Publication of Proposed Regulations. Subsection (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because this rule merely removes an obsolete clause and the associated prescription from the DFARS.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf Items), and for Commercial Services

This rule only removes obsolete DFARS clause 252.232-7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, and the associated prescription. This rule does not create any new solicitation provisions or contract clauses that apply to contracts at or

below the simplified acquisition threshold, for commercial products, including commercially available off-the-shelf items, or for commercial services.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the *Federal Register*. The Office of

Information and Regulatory Affairs has determined that this rule is not a major rule under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for public comment.

VII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 232, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 232, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 232, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

212.301 [Amended]

2. Amend section 212.301 by removing paragraph (f) (xiv) (G).

PART 232—CONTRACT FINANCING

3. Revise sections 232.009 and 232.009-1 to read as follows:

232.009 Providing accelerated payments to small business contractors and to prime contractors that subcontract with a small business concern.

232.009-1 General

10 U.S.C. 3801(b) requires DoD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days.

232.009-2 [Removed]

4. Remove section 232.009-2.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.232-7017 [Removed and Reserved]

5. Remove and reserve section 252.232-7017.